Almost every lawyer practicing wine law has a story that makes the listener envious: walking the vineyards with Robert Mondavi or concluding a deal by throwing an elaborate wine-tasting party in the fields under moonlight. Or how about owning your own winery? Now, more than ever, is an exciting time to be a wine lawyer.

With recent court decisions, new environmental regulations, consolidation, and a booming market for wine in the United States, everything is in flux. “There are a lot of significant things happening,” says James M. Seff, leader of Pillsbury Winthrop Shaw Pittman’s wine, beer, and spirits practice and 1992 president of The Bar Association of San Francisco. “It’s a great time to be practicing.”

“When I first began, the industry was focused on excise taxes and labeling issues,” says Wendell Lee, general counsel at the Wine Institute, the largest trade association of California wineries and associated businesses. “In the last several years, there has been much more of an environmental focus.”

RECENT COURT DECISIONS

In May 2005, the U.S. Supreme Court sent tremors through the wine industry when it decided Granholm v. Heald and struck down laws in Michigan and New York that barred out-of-state wineries from selling directly to consumers. The Court held the states’ laws violated the commerce clause and exceeded state power under the Twenty-First Amendment.

Prior to the decision, says Seff, the direct sale of wine to other states was a matter of state control. Most states regulated the sale of alcoholic beverages, including wine, through a three-tier distribution system—producers, wholesalers, and retailers. Typically, in-state interests were given favorable treatment over out-of-state distributors or producers. For instance, Michigan’s law allowed out-of-state wine producers to sell only to licensed in-state wholesalers, who could sell only to in-state retailers, who resold the wine to consumers. However, the forty in-state wineries could sell the wine they produced directly to consumers without going through a wholesaler and could ship wine to consumers’ homes.
What the case potentially does is open up the wine market throughout the United States. “Granholm was a great present,” says Seff, who filed an amicus brief on behalf of the wine industry and also flew to Washington, D.C., to hear the oral argument. “It was very interesting, very exciting.”

A federal district court case, Costco Wholesale Corp. v. Hoen, which is on appeal, is also poised to increase wine sales. In April 2006, the court reversed a ban on sales from out-of-state wineries to Washington retailers, essentially challenging the state’s three-tier distribution system.

“When states are asked to present an articulate, sensible, practical explanation for preventing out-of-state wineries’ shipment to consumers, they can’t,” says Lee.

“These cases show the threetiered system of distribution is not holding up anymore,” says Richard P. Mendelson, an expert on vineyard and wine law at Dickenson, Peatman & Foggarty in Napa, who also teaches UC Berkeley Boalt Hall School of Law’s first ever wine law course (and this fall, a short course at Yale Law School). “But this kind of litigation is at the beginning, not the end. The cases raise more questions that have yet to be answered.”

If distribution opens up, as wine lawyers predict it will, sales and growth of the California wine industry will boom. The industry has already grown tremendously. According to the Wine Institute, California is the fourth largest wine producer in the world and the leading wine producing state, making more than 90 percent of all U.S. wine. In 2006, California wine sales reached an all-time high: 449 million gallons, with a retail value of $17.8 billion. Mendelson says that in 2005 wine surpassed beer as the most popular alcoholic drink in the United States, in part, he believes, because of the recently publicized health benefits of drinking wine in moderation.

“When I started practicing in this area,” says Seff, “there were twenty wineries in Napa. Now there’s at least two hundred.” In January, Pillsbury hired nonattorney Jerry Jolly, a thirty-one-year veteran of the California Department of Alcoholic Beverage Control, as a consultant to the firm’s practice group and to give the firm an edge. “We have so much work these days,” says Seff, who is currently helping a winery purchase another winery.

**ENVIRONMENTAL LAWS**

As the wine industry grows, so does the need for water. One of the biggest environmental issues for grape growers is water and its availability, says Barry H. Epstein, managing partner at Fitzgerald Abbott & Beardsley in Oakland and chair of the firm’s land use, environment, and natural resources practice group; he also chairs The Bar Association of San Francisco’s Environmental Law Section. As the demand for California wines has increased, growers...
have devoted more land to grapes. “You drive through the Southern Central Valley or even the Central Valley and you see miles of vineyards now,” says Epstein. “A huge amount of acreage is going to grapes.” Epstein says it makes sense: grapes have become a high-value crop with the explosion in the wine market, and grapes, after a year or two, use relatively little water compared to other crops.

“Water,” says Epstein, “has been a problem and is now becoming an acute problem.” Epstein is currently working with three farmers to use water more efficiently—taking it from a stream during the winter, rather than the summer, and storing it in ponds for use in the summer. That involves working with the water board to secure the necessary permits and licenses.

Wine lawyers are also watching AB 32, the state’s Global Warming Solutions Act of 2006. At the same time, this is an industry that is ahead of the game in terms of sustainability. Already, the industry and its lawyers work closely with local agencies and boards regarding emissions. For instance, in the San Joaquin Valley in December 2005 the San Joaquin Valley Air Pollution Control District adopted Winery Rule 4694, which is designed to reduce emissions of ethanol from the fermentation and bulk storage of wine. The rule requires each major winery facility to reduce emissions in the valley in an amount equal to at least 35 percent of the ethanol emissions emitted from its wine fermentations. According to Lee, to meet this goal, the rule has three compliance options: (1) install onsite emission controls; (2) capture surplus emissions created from sources other than winery fermentation tanks; or (3) rely on district-created emissions reductions, funded by the winery’s payment to the district’s mitigation fund. Lee, who calls the rule “innovative,” says that the industry has focused on the second option by controlling the emissions from six brandy warehouses. This process is expected to reduce ethanol emissions by at least four to five times the emissions reductions required by the rule and will generate air emission credits for all companies.
For the past five years the Wine Institute has run a sustainable wine-growing program that promotes social responsibility and environmental stewardship. “Wineries can assess their sustainability impact on the environment,” says Lee, who says 50 percent of the grape acreage in California subscribes to the program. “We hope to get more involved and get more repeat customers.”

**Archaic Rules**

Underneath the overlay of legal changes is a fairly archaic system of rules and laws. “The government is involved in the production, distribution, and sale,” says Mendelson, who owns a Napa winery, Mendelson Vineyards, and produces a dessert wine and a pinot noir. “And it’s often counterintuitive. You need to understand the history of prohibition to have any understanding of beverage law or to be able to explain it to a client.”

Even if so much wasn’t in flux, wine law is a great practice, say these lawyers. “The wine industry is filled with great people, third-, fourth-generation wine families,” says Lee. “Many appreciate the unwritten responsibility as stewards of the land. We had our own Al Gores before Al Gore.”

Nina Schuyler is a lawyer whose first novel, *The Painting*, was published in 2004. She is currently working on her second novel. She can be reached at ninaschuyler@hotmail.com.

According to the Wine Institute, California is the fourth largest wine producer in the world and the leading wine producing state, making more than 90 percent of all U.S. wine.